IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT CHANCERY DIVISION

ERNEST WALKUP,	)	
	)	
Plaintiff,	)	**No. 12 CH 30044**
	)	
VS.	)	**Hon. Neil H. Cohen**
	)	**Judge Presiding**
GARRY MCCARTHY,	)	
Superintendent of the	)	
Chicago Police Department,	)	
and THE POLICE BOARD	)	
OF THE CITY OF CHICAGO,	)	
	)	
Defendants.	)	

SUPPLEMENTARY MEMORANDUM OPINION AND ORDER[1]

Plaintiff Chicago Police Officer Ernest Walkup has filed a Complaint for Administrative Review of the decision of the Police Board of the City of Chicago to discharge him from his office, per the request of Garry McCarthy, the Superintendent of the Chicago Police Department.

For the reasons enunciated herein, this court reverses the decision of the Police Board and remands with instructions to the Board that it consider all of the mitigating evidence elicited at the hearing and impose a less drastic sanction than discharge from the force.

I. PROCEDURAL BACKGROUND

On the morning of September 22, 2009, uniformed and armed Chicago Police Officer Ernest Walkup drove to his assigned detail at the Chicago Police Training Academy while under the influence of alcohol. (R. at 72-73, 75, 82-83, Plaintiff's ("Pl.") Ex. 1).

Six months later, on May 18, 2010, Officer Walkup was determined by the Chicago Police Department's own forensic psychologists to be fit for duty (R. at 95-96, Respondent's ("Resp.") Ex. 3), and he was returned to duty as a uniformed and armed Chicago Police Officer. (R. at 84).

Twenty-seven months after the initial incident, on March 9, 2012, the Superintendent filed charges against Officer Walkup seeking his discharge from the Chicago Police Department ("the

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[1] The court, on this date, has filed this Supplementary Memorandum Opinion and Order to that which was originally filed on August 6, 2013. No substantive changes are made in this Supplementary Opinion. All modifications are merely cosmetic.

Department") for his conduct of September 22, 2009. (R. 31-32, 34).

Those charges alleged that by having driven to work while under the influence of alcohol on September 22, 2009, Officer Walkup simultaneously violated:

(1) Department Rule 1, which prohibits an officer from violating any law or ordinance, here, Illinois' DUI statute, 625 ILCS 5/11-501(a)(2);

(2) Department Rule 2, which prohibits any action or conduct which impedes the Department's efforts to achieve its policy and goals or which brings discredit upon the Department; and,

(3) Department Rule 15, which prohibits any officer from being intoxicated, whether on duty or off. (R. 31-32). [2]

Officer Walkup pled guilty to each of these charges at a proceeding before a Police Board hearing held on June 7, 2012. (R. at 69). [3]

Following that plea, the parties immediately proceeded to an evidentiary hearing in aggravation and mitigation. (R. 69-96).

On June 21, 2012, thirty months after the initial incident and two years after the Department ordered him back to active duty, the Police Board acceded to the Superintendent's discharge request. (R. at 40).

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[2] The Chicago Police Board has promulgated a set of rules which apply to Department members. These rules list prohibited conduct and form the basis for disciplinary proceedings against officers who allegedly violate them.

[3] It is the Board's responsibility to provide an administrative record containing all of the evidence it used to arrive at its decision for the trial court's review. Mueller v. Board of Fire and Police Commissioners of Village of Lake Zurich, 267 Ill.App.3d 726, 733-34 (1994).

The Findings and Decision of the Police Board records that none of the members of the Police Board attended Officer Walkup's discharge hearing. Rather, those members "read and reviewed the record of the proceedings and viewed the video-recording of the testimony of the witnesses." (R. at 34)(emphasis added). That video-recording --- which is the best evidence of what actually occurred at the hearing and which at least in part served as a basis for the Board's findings and ultimate decision --- was not made part of the Administrative Record for this court to review.

II. FACTUAL BACKGROUND

The evidence elicited at the hearing before the Police Board discloses the following: [4] [5]

A. September 22, 2009

At approximately 7:00 a.m. on September 22, 2009, Officer Ernest Walkup's arrived for his return-to-service training at the Police Training Academy of the Chicago Police Department. He was inebriated. (R. at 72-73)

His condition was quickly brought to the attention of Officer Walkup's commanding officer, Lt. Michael Pigott. (R. at 72). Lt. Pigott met with Officer Walkup near the lieutenant's office in the first floor hallway of the Academy. (Id.).

Officer Walkup looked disheveled and lethargic and had drooping, bloodshot eyes. (R. at 73). When questioned, Officer Walkup admitted he had been drinking and, upon command, followed Lt. Pigott some 75 feet down the hallway to the office of Sgt. Robert O'Neil. (Id.). Officer Walkup cooperated with his superiors entirely during the investigation. (R. at 74). He surrendered his weapon upon request, voluntarily answered questions and voluntarily submitted to field sobriety tests and a breathalyzer test. The breathalyzer test disclosed that Officer Walkup had a blood-alcohol content of .30, or almost four times the legal limit. (R. 75, Superintendent's Ex. 1). No recruits or trainees were in the area at the time of Lt. Pigott's encounter with Officer Walkup. (R. at 74). Lt. Pigott called the Internal Affairs Division ("IAD") and remained with Officer Walkup until approximately 30 minutes later when the IAD investigators came to escort Officer Walkup from the building. (R. at 73).

B. Post-September 22, 2009: Efforts to Achieve and Maintain Sobriety

The following day, September 23, 2009, Officer Walkup voluntarily entered a thirty day intensive inpatient program. (R. at 58; Resp.Ex. 1).

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[4] The original administrative record was filed without Bates- stamped pages. Upon this court's request, the attorney for the Police Board supplied this court and the parties with a Bates-stamped copy of the original administrative record. By order of this court, both the new copy of the record, as well as said letter, are hereby made of record.

[5] All pages of the Bates-stamped record are stamped in numerical order starting with the number "0452xx." The entire record is comprised of less than one hundred pages. For convenience, this court's Record citations will be to the last two numerals (the "xx" referenced above) of any given page.

Upon his successful completion of the intensive inpatient program, Officer Walkup entered into and successfully completed an intensive outpatient program offered by the Resurrection Health Center. (R. at 83; Resp. Ex. 2).

He thereafter maintained his sobriety with the help of a non-intensive outpatient treatment program at St. Joseph's Hospital, through his attendance at sobriety meetings held by the law enforcement support group, "No Copouts," and through his active participation in the Alcoholics Anonymous program offered at Chicago's Old St. Mary's Church. (Id.).

The evidence is uncontradicted that Officer Walkup's last drink was on September 22, 2009. (R. at 84).

C. May, 2010: The Department's Psychological Testing of Officer Walkup

For a period of two years before the Superintendent charged Officer Walkup, the Department took a completely different tack.

In May, 2010, just six months after the September 22, 2009 event, the Department ordered Officer Walkup to appear for an examination by the Department's own psychologists at The Center for Applied Psychology and Forensic Studies. (R. at 84, 95-96; Resp.Ex. 3).

Per said order, the officer submitted to a battery of clinical tests, including: the California Personality Inventory - 434; the Personality Assessment Inventory; the Symptoms Checklist-90-R; the State Trait Anger Expression Inventory; and the Substance Abuse Subtle Screening Inventory - III. In addition, the doctors conducted a clinical interview of Officer Walkup and a review of his background. (Resp.Ex. 3).

On May 18, 2010, Dr. Michael E. Bricker and Dr. Marva P. Dawkins, two examining Ph.D. clinical psychologists working on the Department's behalf, sent to the Department their signed letter which noted the Department's request for them to examine Officer Walkup, outlined the above-enumerated testing process, and which stated their opinion that, to a reasonable degree of scientific certainty, Officer Walkup was fit for duty. (Id.)

D. May, 2010: The Department Returns Officer Walkup to Active Duty

Later in May, 2010, the Department followed its experts' opinions and returned Officer Walkup to active duty. (R. at 84). His first assignment was to go back to the Police Academy to receive return-to-service training. (R. at 74). Lt. Pigott was there, aware of Officer Walkup presence and kept a watchful eye on him. Per Lt. Pigott, no issues arose regarding either Officer Walkup's use of alcohol or his conduct as a police officer during this tour at the Academy. (R. at 75).

E. August, 2010 to March, 2011: Ofc. Walkup is Assigned to the 6th Police District

In August, 2010, after Officer Walkup successful completion of his return-to-service training, the Department assigned him as an armed and uniformed police officer in the 6th Police District. (R. at 80, 84). He served in this capacity for approximately one year as both a beat and tactical officer.(Id.).

From August 2010 to March 2011, he partnered with 6th District Officer Susan LaScola, a 6th District veteran of 14½ years. (R. at 79, 84). It was Officer LaScola who thought enough of Officer Walkup as a beat officer to have specifically asked her watch commander to put them together as a team on the street. She characterized Officer Walkup as having been a reliable and aggressive officer with an excellent reputation and work ethic during their tour together. She noted that their team had produced excellent results on behalf of the citizens of the 6th District. Officer LaScola said she had seen no signs of alcohol use by Officer Walkup nor any problems with his behavior during their time together. She offered that she would have no qualms against partnering with him in the future. (R. 79-80).

F. April 2011-Spring 2012: Ofc. Walkup is Assigned to the 3-1-1 Center

In April 2011, Officer Walkup was re-assigned from his 6th District patrol/tactical beat to a desk job at the Department's Alternate Response Section (the "ARS") . His job was to take non-emergency telephone calls which came into the City's 3-1-1 system. (R. at 77-79, 84).

Sgt. Ray Young, a CPD veteran of 18 years, was Officer Walkup's watch commander in the ARS. (R. 78). They worked together for approximately a year. Per Sgt. Young, Officer Walkup was "one of his top officers." Sgt. Young testified that Officer Walkup won a competitive position in the ARS as a "power watch officer" for the 3-1-1 system - a leadership role given to an officer who does the best work in helping the citizens who utilize the 3-1-1 system. (Id.).

Lt. Robert Weisskopf, a Department veteran of 29½ years, was Officer Walkup's commanding officer in the ARS. Lt. Weisskopf characterized Officer Walkup as a "very good" and "hard working" officer who successfully competed with other officers in the unit to attain power watch officer leadership status. (R. at 79). Lt. Weisskopf told the Police Board that, "[W]hereever I am working, I would be proud to have (Officer Walkup) working with me. " (Id.).

Both Sgt. Young and Lt. Weisskopf testified that in the approximate year that they worked with Officer Walkup, they never saw any signs of alcohol use by him. (R. 78-79).

G. Officer Ernest Walkup

Officer Walkup testified at the aggravation and mitigation hearing on his own behalf..

Officer Walkup related that he was (then) 49 years old. He testified that he was born into a military family, received a football scholarship to Texas A&M, and then went to DePaul Law School for a year. He could not afford the cost and got a job working for Cook County in the Adult Felony Probation Department at 26th & California, and later in Houston as a full time probation officer. He did this work for ten years prior to joining the Department in 1999. (R. at 81).

He suffered two major vehicular accidents while employed by the Department. The first, in 2002, resulted in a shattered leg, several surgeries and the ultimate loss of three toes. (R. at 81-82). The second, which preceded and resulted in his return-to service assignment in September, 2009, caused a hip fracture and put him on medical leave for close to a year. (R. at 82). During his medical leave, Officer Walkup was housebound and started drinking excessively. (R. at 82-83, 85).

As of September 22, 2009, he had been drinking excessively and was not in control of it. He was intoxicated when he arrived at the Police Academy that day, and was honest about it when asked. (R. at 83). He realized he needed help and voluntarily joined and successfully completed the several programs previously discussed in this opinion. (Id.). He has been sober since September 22, 2009. (R. 84, 85), He still attends AA meetings at No Copouts - a program geared toward law enforcement officers - and at Old St. Mary's Church. (R. at 84-85).

Per Officer Walkup, law enforcement has been his whole life. He made a mistake and has been trying to correct it every day since September 22, 2009. (R. at 84).

H. Officer Walkup's Complimentary and Disciplinary Record

Subsequent to Officer Walkup's testimony, the Police Board was presented with his complimentary and disciplinary record. (R. at 86).

Said record reflects nine commendations, zero prior Complaint Register ("CR") numbers and zero prior Reprimands. (R. at 41A, 42).

III. THE COMMENTS OF THE HEARING OFFICER

After closing arguments, Thomas E. Johnson, the Hearing Officer for the Police Board asked Mr. O'Neill, the prosecuting attorney:

> **What do you make of the fact that a year -- not a year but eight months after the incident the Department's own contracted psychologist found him to be fit-for-duty and they put him back to work? (R. at 87).**

Hearing Officer Johnson then opined:

> **I mean the Department knows of this incident the day it happened, we have testimony that a CR is taken right away in September of 2009, and then as this**

IAS process sort of grinds along in a very slow way, Officer Walkup is getting treatment and some other arm of the police department is saying that he's fit to return. And then after the fitness finding, IAS finally gets around to saying, 'oh, no, we should discharge him.' (R. at 88).

So there is definitely two messages being sent by the police department here. * * * One part of the Department wants to discharge him and the other part says that he's fit-for-duty and has gone through the treatment. (Id.).

And, finally:

I just don't get why the Department leaves this in the hands of the Police Board when the Department has people who are alcohol experts that they contract with. (Id.).

IV. THE FINDINGS AND DECISION OF THE POLICE BOARD

The Police Board did not share Hearing Officer Johnson's assessment. On June 21, 2012, it issued its written findings which sustained the Superintendent's request to discharge Officer Walkup from his service with the Department. (R. 34-40).

In its preamble, the Board stated that it "considered the facts and circumstances of (Officer Walkup's) conduct, and the evidence presented in defense and mitigation." (R. at 37).

A. " ... the facts and circumstances of his conduct ... "

With reference to the "facts and circumstances his conduct," the Board found it important that Officer Walkup drove to work and reported to duty with his service weapon while his blood alcohol concentration was nearly 4 times the legal limit. The Board declared that Officer Walkup's decision to drive his car and carry his guy while so intoxicated indicated a gross disregard for the safety of members of the public and the Department , and a lack of judgment so serious as to render him unfit to be a Chicago police officer. (R. at 37-38):

> * * * We find that, based upon Respondent's conduct, returning him to duty as a police officer, armed and authorized to use deadly force, poses an unacceptable risk to the safety of the public and his fellow officers. (R. at 38).

B. "the 2 ½ years . . . from the date of the incident until the filing of charges . . . "

Vis-a-vis the timing concerns voiced by Hearing Officer Johnson, the Police Board stated:

> We are also deeply troubled by the amount of time (2½ years) it took from the date of the incident until the filing of charges with the board. While this delay did not

affect our ability to understand the facts of this case, since there is no dispute about what those facts are, the delay is troubling nonetheless. There appears to be no valid reason for the delay. Indeed, this inexplicable delay made it possible for Officer Walkup to be put back to work on the street. If this case were brought in a timely manner, the safety of the public would not have been put at unnecessary risk. (Id.).

As to Hearing Officer Johnson concern regarding the Department's seemingly divergent positions on the issue of Officer Walkup's return to active duty, the Police Board stated:

> Respondent argues that he should not be discharged because a psychologist selected by the Department found him fit for duty, and he was in fact restored to duty until the charges were brought. We find this argument unpersuasive. The public is not responsible for the delay or the Department's about-face on Walkup, and protection of the public must trump other concerns. The Respondent's testimony regarding his condition and his treatment he as undergone since September 2009 is not sufficient to overcome the risk to the public safety that would arise from his returning to duty. (Id.).

C. " . . . the evidence presented in defense and mitigation . . . "

With reference to Officer Walkup's conduct since September 22, 2009 --- "the evidence presented in defense and mitigation" which formed the core of his case --- the Police Board wrote nothing.

D. The Police Board's Conclusion: Good Cause

In conclusion, the Police Board reiterated its position:

> We find that the Respondent's conduct is sufficiently serious to constitute a substantial shortcoming that renders his continuance in his office detrimental to the discipline and efficiency of the service of the CPD, and is something which the law recognizes as good cause for his no longer occupying his office. (R. at 39).

* * * * *

Officer Walkup timely appealed from that finding. The parties have filed briefs in support of and in opposition to the Complaint. The court heard oral argument on this matter on July 1, 2013.

V. LEGAL ANALYSIS

A. Standard of Review

Administrative Review of a decision of the Police Board involves a two-step process. "First, the court must determine whether the agency's finding of guilt is contrary to the manifest weight of

the evidence. O'Boyle v. Personnel Board of Chicago, 119 Ill. App. 3d 648, 653 (1st Dist. 1983). Second, the court must determine whether the findings of fact constitute a sufficient basis for the conclusion that cause for discharge exists. Massingale v. Police Board, 140 Ill. App. 3d 378, 381 (1st Dist. 1986). Where, as here, the facts are not in issue, the court need only involve itself in consideration of whether the facts elicited before the board constitute a sufficient basis for its conclusion that cause for discharge exists. Id., at 381.

A court cannot substitute its judgment for that of the administrative agency. Yeksigian v. City of Chicago, 231 Ill. App. 3d 307, 312 (1st Dist. 1992).The test is not whether the court would impose a lesser penalty if it were making a decision in the first instance; rather, the test is whether, in view of the circumstances, the agency acted unreasonably or arbitrarily. Massingale, 140 Ill. App. 3d at 381.

Nevertheless, a reviewing court must not be a rubber stamp for the Police Board's decision. Rather, an administrative review of whether "cause for discharge" exists requires this court to determine whether under the totality of the circumstances the decision to impose the ultimate sanction of discharge is arbitrary, unreasonable or overly harsh. Massingale, 140 Ill. App. 3d at 381, citing Kirsch v. Rochford, 55 Ill. App. 3d 1042, 1045 (1st Dist. 1977)(McNamara, J.). See also, Edwards v. Illinois Racing Board, 187 Ill. App. 3d 287, 293 (1st Dist. 1989)(overly harsh); Bell v. Civil Service Commission, 161 Ill. App. 3d 644, 648 (1st Dist. 1987)(the determination of whether cause to discharge exists may be reversed if the decision is arbitrary, unreasonable, or unrelated to the requirements of service.); Washington v. Civil Service Com., 98 Ill. App. 3d 49 (1st Dist. 1981)("We are mindful of the need for proper departmental discipline in a police force. We are also fully aware of the need to protect ... However, upon review of the entire record, we are compelled to find the discipline imposed on the plaintiff to be unduly harsh and thus unwarranted.").

B. Prior Decisions

While each case must be viewed within the context of the totality of its own circumstances, this court is informed and taught by the legendary minds and authors of several decisions from our Appellate Court of Illinois for the First District and state supreme court.

In Kirsch v. Rochford, 55 Ill. App. 3d 1042, 1045 (1st Dist. 1977)(McNamara, J.)(Simon and Jiganti, concurring), Chicago Police Officer Kirsch was severely intoxicated, publicly obnoxious and unruly at an O'Hare Field gate prior to boarding a flight. His conduct was the cause of a disturbance not only at the airport, but again later at the police station. Id., at 1045. The evidence supported the Board's findings that Kirsch had violated three of the Department's rules and regulations. The administrative record nevertheless disclosed that Kirsch had in the end "cooperated and submitted obediently" to police authority. It was also of record that Kirsch had been a member of the police department for a number of years, and that the record was silent as to any evidence in aggravation. Id. at 1046. The trial affirmed the Police Board's decision to discharge. On appeal, Justice McNamara, speaking for a unanimous panel, wrote "[W]hile the charges were not unreasonable or arbitrary, we believe the matter must be remanded so that the Board can consider an alternative

sanction to that of discharge." Id., at 1046.

In its consideration of the severity of the penalty of discharge, the Kirsch court relied, in part, on Kreiser v. Police Board, 40 Ill. App. 3d 436 (1st Dist. 1976)(Jiganti, J)(Stamos, J. and Hayes, J., concurring)("Kreiser I "), *aff'd*, 69 Ill.2d 27 (1977) ("Kreiser II"). There, Officer Kreiser had operated his car without a license, failed to obey an order of a superior officer, lied to a superior officer, and had left the police station without being relieved. Id., at 438-440. Once again, the reviewing court found the facts to justify a sanction. The question was whether the findings of the Board presented sufficient cause to warrant Officer Kreiser's discharge, as the trial court had so held. Id., at 441. In reversing the findings of the Board and the affirmance of the trial court, Justice Jiganti had this to say:

> Although this court can in no way condone plaintiff's actions, we fail to see that this conduct, as unsatisfactory as it may be, is sufficient cause to require plaintiff's discharge from the Department, especially in light of testimony by a number of reputation witnesses as to his satisfactory service record of almost six years with the Department. We do not see these findings, without more, are sufficiently substantial or so significantly related to the performance of Kreiser's police duties as to demand the maximum penalty of discharge and removal from the Department.

Kreiser, 40 Ill.App.3d at 441-42.

The Board's appeal to our supreme court went for nought. In Krieser II, Chief Justice Ward spoke for a unanimous court in affirming the First District's holding that "the plaintiff's discharge cannot stand", and noted that said holding was in keeping with prior supreme court precedent. Kreiser v. Police Board, 69 Ill.2d 27, 31.

Kreiser II also taught that:

> "[T]he effect of the appellate court's reversal *** is to restore the plaintiff to duty status with the police department without any alternative sanction having been considered. In our opinion the proper disposition to make here is one similar to that which this court made in Basketfield v. Police Board (1974), 56 Ill.2d 351, 360, namely to remand the matter to the Board for consideration of what action, if any, should be taken."

Kreiser II, 69 Ill.2d at 31.

Basketfield v. Police Board, 56 Ill.2d at 360, another police misconduct Police Board case is informative in that in its remand order, the court instructed the Board to:

> ... reconsider the appropriate disciplinary action be taken against Basketfield who, since he became a police officer in 1953, had no prior complaints concerning the performance of his duties.

Id.

Finally, in Massingale v. Police Board, 140 Ill.App.3d 378 (1st Dist. 1986), Officer Massingale pled guilty to charges before the Police Board stemming from her having driven while intoxicated when off-duty. Said conduct was the officer's only violation of the Department's rules and regulations since she had joined the force 7 years before. The Police Board found the violation to be serious enough to amount to cause for discharge. The trial court affirmed. In reversing and remanding, the appellate court, relying *inter alia* on Kirsch I, held:

> We are mindful of the need for proper departmental discipline in a police force. We are also fully aware that the off-duty conduct of law enforcement officers is subject to reasonable regulations and can serve as a cause for discharge. (citations omitted). However, upon review of the entire record here, we believe the maximum sanction of discharge imposed on the plaintiff is unwarranted.
>
> * * * * *
>
> The record establishes that plaintiff was intoxicated while driving her automobile, her only violation of the rules and regulations of the police department. We note that the plaintiff had been a member of the police department for seven years and that she was not on duty at the time of the incident. The loss of a job is both a harsh discipline and a serious deprivation to impose on plaintiff. While we do not find that the charges were unreasonable or arbitrary, we believe that the matter must be remanded so that the board can consider an alternative sanction to the discharge.

Id. at 382.

VI. ADMINISTRATIVE REVIEW

This court is mindful of the need for proper departmental discipline in a police force, and is fully aware of the need to protect the citizens of this city. This court also has nothing but the greatest personal and intellectual respect for those who serve on the Police Board and those who advise it.

Nevertheless, based upon the evidence elicited at the hearing, the Board's findings of fact, and the decisions applicable thereto, this court is convinced that this matter must be remanded to the Board with instructions for it to impose a penalty which is commensurate with totality of the elicited evidence, and which is less than the maximum sanction of discharge.

A. Process: The Police Board's Decision

As a matter of law, the Police Board is required to consider the totality of the circumstance in the record before it to determine whether discharge is warranted. Massingale, 140 Ill. App. 3d at 381; Kirsch v. Rochford, 55 Ill. App. 3d at 1045.

The written decision of the Police Board, however, leaves little doubt that it did not do so.

It is true that the Police Board's written decision stated as a preamble that the Board, "considered the facts and circumstances of (Officer Walkup's) conduct, and the evidence presented in defense and mitigation." (R. at 37). Even so, the decision fails to reference any of the mitigating evidence, save the two year time lapse between the date of the triggering event and the date when he the officer was charged. (R. at 38).

Specifically, the Board's decision fails to reference the mitigating conduct elicited at the hearing which demonstrated that:

1. Officer Walkup did not display a continuous lack of discipline, either on September 22, 2009, before or thereafter;

2. Officer Walkup's conduct was not compounded by violence, either on September 22, 2009, before or thereafter;

3. Officer Walkup's conduct was not compounded by his disregard of orders from his superiors, either on September 22, 2009, before or thereafter;

4. Officer Walkup did not lie to investigators, either on September 22, 2009, before or thereafter;

5. Officer Walkup did not deny, but took full responsibility for his aberrant conduct;

6. Officer Walkup immediately went into and successfully completed an intensive impatient program to take care of his problem;

7. Officer Walkup thereafter went into and successfully completed an intensive outpatient program through Resurrection Health Care;

8. Officer Walkup thereafter followed up with and successfully completed a non-intensive outpatient program at St. Joseph's Hospital;

9. Officer Walkup supplemented his aftercare program with active participation in the "No Cop-Outs" sobriety program and with the AA sobriety program at Old St. Pat's Church;

10. Officer Walkup has remained sober since September 22, 2009;

11. Officer Walkup has earned a reputation for fine work and integrity from his peers (Officer LaScola) and his commanding officers (Sgt. Young and Lt. Weisskopf) - all of whom would look forward to having him as either their partner or as a member of the team they manage;

12. Officer Walkup was armed as a beat and tactical officer in the 6th Police District and excelled at his position, without blemish or even the hint that the Board's expressed concern for the safety of the community might become realized;

13. Officer Walkup's character and conduct while detailed to the Alternative Response Section, including having risen to a position of leadership in said section because he dealt so well with the citizens with problems who called into the Department's 3-1-1 Center;

14. Officer Walkup's tenure as a police officer is marked by 9 commendations and zero CR numbers or Reprimands; and

15. Officer Walkup's pristine general record as an officer and as a person since the Department's own psychologists found him fit for duty.

Despite having given lip service to the contrary, it is not hard to conclude that the Police Board failed to consider the totality of circumstances attendant to this matter. None of these uncontradicted facts were referenced in the Board's decision, let alone the subject of discussion. In view of the number and cumulative nature of these mitigating factors, it is not difficult to conclude that despite the Board's statement to the contrary, the mitigation was not really given much, if any, consideration at all in terms of fashioning the proper sanction.

It is, of course, true as the Police Board wrote that "the public is not responsible for the delay or the Department's about-face on Walkup," (R. at 38), but that truth does not lead to the Board's conclusion that "based upon [Officer Walkup's conduct, returning him to duty as a police officer, armed and authorized to use deadly force, poses and unacceptable risk to the safety of the public and his fellow officers. " (R. at 38).

By the facts elicited at the hearing, the Board had before it the living laboratory of at least two years of the officer's post-September 22, 2009 behavior as convincing evidence to the contrary. There is no evidence that any of that behavior posed any "risk to the safety of the public and his fellow officers, let alone an "unacceptable" one. Indeed, his fellow officers testified that his conduct was impeccable - both while armed and not.

It may be, as the Board stated, that the "inexplicable delay" of some 2 ½ years from the date of the incident until the filing of charges made it possible for Officer Walkup to be put back to work

and that if the case had been brought in a timely manner, the result might have been different. (R. at 38). But those were not the facts before the Board. And it cannot stick its head in the sand ostrich-like and pretend that somehow all of the mitigating circumstances which accrued post-September, 22, 2009 magically never happened. That is not the Board's legal charge, and it is not doing its duty if it ignores them - regardless of what opinion the Superintendent holds on the matter.

As in Kirsch, Officer Walkup was severely intoxicated and his conduct violated three of the Department's rules and regulations. And, as in Kirsch, the administrative record discloses that Walkup cooperated and submitted to authority, was a member of the Department for a number of years, but is silent as to any evidence in aggravation outside of the triggering conduct itself.

As in Kreiser I, Officer Walkup presented numerous reputation witnesses - both rank and file and command - attesting to his good character as a member of the Department.

As in Basketfield, there were no prior complaints concerning Officer Walkup's performance of his duties.

And, as in Massingale, Officer Walkup pled guilty to the charges before the Police Board stemming from his having driven while intoxicated, and said conduct was, according to the record, the only rules violation since his joining the force in 1999.

In all of the cited cases, our appellate and supreme courts, being "mindful of the need for proper departmental discipline in a police force", Massingale, 140 Ill.App.3d at 382, found that while the charges were not unreasonable or arbitrary, the imposition of the maximum penalty of discharge was unwarranted.

So it is here.

VII. CONCLUSION

Upon review of the entire record, this court has the firm conviction that the maximum sanction of discharge imposed on the plainitff was arbitrary, unreasonable, unduly harsh and therefore unwarranted. Kirsch v. Rochford, 55 Ill.App.3d at 1045.

This cause is remanded to the Police Board to determine a sanction less drastic than discharge.

ENTERED:

ENTERED
Judge Neil H. Cohen-2021
AUG 08 2013
DOROTHY BROWN
CLERK OF THE CIRCUIT COURT
OF COOK COUNTY, IL
DEPUTY CLERK

Hon. Neil H. Cohen, #2021